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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 505

MANHATTAN PROPERTIES, INC.,
Petitioner,

vs.

IRVING TRUST COMPANY, as trustee in bankruptcy of OLIVER A. OLSON CO., INC.

No. 506

SAMUEL R. BROWN, ALMIRA B. MILLARD, ALFRED MILLARD and HUGH MILLARD,
Petitioners,

vs.

IRVING TRUST COMPANY, as trustee in bankruptcy of UNITED CIGAR STORES COMPANY OF AMERICA.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The District Court rendered no opinion. The opinions of the United States Circuit Court of Appeals are reported in 66 Fed. (2nd) 470, 473.

JURISDICTION

The judgments of the Circuit Court of Appeals to be reviewed were entered July 24, 1933 (No. 505, R. 30; No. 506, R. 39). The petitions for certiorari were filed October 5, 1933. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Stated broadly, the question is whether, if a tenant is adjudicated a bankrupt, his landlord's claim for damages for loss of future rents is a provable debt in bankruptcy.

STATUTES INVOLVED

The pertinent provisions of Section 63 of the Bankruptcy Act are as follows:

> "*Debts provable against.* (a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * * (4) founded upon an open account, or upon a contract express or implied; * * *.
>
> (b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate."

Section 1(11) provides:

> "'Debt' shall include any debt, demand or claim provable in bankruptcy."

Section 17 provides:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts," with the exceptions not here material.

(Act of July 1, 1898, Sections 1, 17 and 63, 30 Stats. 562, as amended; U. S. C. A., Title 11, Sections 1, 35 and 103.)

STATEMENT

No. 505. Manhattan Properties, Inc.—On March 18, 1932, Oliver A. Olson Co., Inc. was adjudicated a bankrupt in the Southern District of New York. On December 20, 1927, one Reid, then owner of certain real estate in New York City, leased it to the Oliver A. Olson Co., Inc., at a stated rental for a term of nine years and eight months, beginning February 1, 1928, and ending October 1, 1937 (R. 3). In December, 1928, the premises were conveyed to Manhattan Properties, Inc. subject to the lease. The rent was paid to and including January, 1932. The tenant defaulted in the rent for February and March, 1932, and then an involuntary petition was filed against it and it was adjudicated a bankrupt. The Manhattan Properties, Inc. then filed its claim, one item of which was $25,000 damages for loss of future rentals. The total rent reserved for the balance of the term after bankruptcy was $58,000. The claimant alleged that the present rental value for the remainder of the term was $33,000, and asked to have its claim liquidated for the difference (R. 2).

The lease (R. 3) contained a provision (R. 13) that if the tenant should default in the payment of rent

> "or if the Tenant abandon said premises, if said premises become vacant, if the Tenant become insolvent, if the Tenant make an assignment for the benefit of creditors, if bankruptcy proceedings be instituted by or against the Tenant * * * then it shall be lawful for the Landlord, or the Landlord's agent, without notice, to re-enter said premises * * * and in the event of such re-entry or the cessation or cancellation or such estate, lease, renewal or extension, the Tenant, * * * hereby waives any and all right to redemption now or hereafter given by any law. The Landlord may, after obtaining possession of said premises, re-let the same or any part thereof as the agent of the Tenant for the whole or any part of the term herein demised, from time to time, as the Landlord may deem best. * * * The Tenant further agrees to pay each month to the Landlord the deficit accruing from the difference between the amount to be paid as rent as herein reserved and the amount of rent which shall be collected and received from the demised premises for such month during the residue of the term herein provided for after the taking possession by the Landlord; the overplus, if any, at the expiration of the full term herein provided for shall be paid to the Tenant unless the Landlord within a period of six months from the termination of this lease as provided herein shall, by a notice in writing, release the Tenant from any and all liability created by this provision of the lease, which it is agreed the Landlord shall, at the Landlord's option, have the right to do, in

> which event it is agreed that the Landlord and the Tenant shall have no further rights and liabilities hereunder."

The referee in bankruptcy expunged and disallowed so much of the claim as sought damages for loss of future rents (R. 17), on the ground that, as a matter of law, it did not constitute a provable claim in bankruptcy (R. 20). On petition to review, the referee's order was affirmed by the United States District Court (R. 21). On appeal to the United States Circuit Court of Appeals, the order of the District Court was affirmed (R. 25).

In *No. 506, Brown* v. *Irving Trust Company,* the bankruptcy proceeding was commenced August 29, 1932, in the Southern District of New York by the filing of a voluntary petition by the United Cigar Stores Company of America, a New Jersey corporation (R. 1). The adjudication followed on the same day. In that case the lease under which the bankrupt held was dated June 14, 1920, covering real estate in the State of Nebraska for a term expiring June 30, 1945, at a stated annual rental payable in monthly instalments (R. 3). The lease contained a covenant that on default by the lessee or if the lessee shall be adjudicated a bankrupt, the lessor may enter and re-possess the premises

> "and upon entry as aforesaid, this lease shall terminate, and the Lessee covenants that in case of termination, it will indemnify the Lessor against all loss of rent which the Lessor may incur by reason of such termination during the residue of the term above specified."

On November 23, 1932, the trustee in bankruptcy disaffirmed the lease (R. 21). On November 26, 1932,

the landlord took possession and proceeded to collect rents from occupants of the premises (R. 21). On January 13, 1933, the landlord filed a proof of claim which, as amended (R. 19), included an item of $4,404.40, representing the difference between rent accrued to date of re-entry and the collections from occupants of the premises during that period, and an item of $140,615.80 (R. 21), representing the difference between the alleged rental value for the remainder of the term after re-entry and the rent reserved in the lease. Application was made by the landlord for liquidation of his claim under Section 63(b) of the Bankruptcy Act (R. 16). The trustee applied to have the claim expunged and disallowed (R. 18). The referee expunged and disallowed both items for damages for loss of future rent after the date of filing the petition, holding that as a matter of law they were not provable (R. 23, 29). On petition for review, the action of the referee was affirmed by the District Court (R. 33), and on appeal, the United States Circuit Court of Appeals affirmed the judgment below (R. 39).

SPECIFICATION OF ERRORS

The court below erred in each case:

(1) In holding that the claim for damages for loss of future rents was not, as a matter of law, a provable debt.

(2) In adhering to the rule of *In re Roth & Appel,* 181 Fed. 667.

(3) In affirming the decree of the District Court disallowing the claim.

SUMMARY OF ARGUMENT

A lease is a contract within the meaning of the Bankruptcy Act. The purpose of the Act, which is to clear the bankrupt of all obligations, requires that the landlord's claim be provable and dischargeable.

I. The decisions below, holding that a landlord's claim for loss of future rents is not a provable claim in the bankruptcy of his tenant, were made on the authority of its former decision in *Re Roth & Appel,* the grounds for which were that such claims are contingent, and the loss not readily ascertainable. Both grounds have been destroyed by decisions of this Court. The lower court substantially admits that.

II. The other circuits are in conflict. In those rejecting such claims, the grounds assigned are

(1) That the claims are subject to contingencies;

(2) That the amount of loss is not readily susceptible of ascertainment; or

(3) That reentry by a landlord extinguishes the covenant to pay rent.

III. The correct rule is to be found in the Bankruptcy Act as interpreted by this Court. Congress has power to make such claims provable. The question is one of interpretation of the statute. As long ago as 1915 this Court held that contingency is no obstacle to provability, that the purposes of the Act are to relieve debtors of all obligations and to allow their obligees to participate in the distribution of assets, and that provable debts include all obligations on contract, susceptible of liquidation, whether or not contingent.

IV. The above principles announced in the decisions of this Court lead to the conclusion that such claims are provable.

V. There is no reason why a distinction should be made between claims of landlords for loss of future rents, and claims on other types of executory contracts.

VI. There is no sound reason consistent with the purposes of the Bankruptcy Act, why distinction should be made between leases which contain indemnity covenants, preserving the liability of the tenant after reentry, and leases which do not. In either case the purpose of the Act is defeated if the bankrupt remains liable after discharge. In either case the effect of the bankruptcy is to disable the tenant to perform, and to inflict a loss on the landlord.

VII. If the narrower ground be adopted, and covenants of indemnity held necessary to allow proof of such claims, the leases here involved contain them.

VIII. Notwithstanding the rule to the contrary in some circuits, this Court should not refuse to hold such claims provable. A decision either way will overturn the rule in some circuits. The question has never really been at rest in any circuit. A rule of property is not involved. Provability has depended on the location of the bankruptcy proceedings.

IX. Under the English system, such claims have been provable for more than sixty years, without regard to the existence of indemnity covenants.

X. The amendment of March 3, 1933, to the Bankruptcy Act declares such claims to be provable debts to be liquidated under section 63(b). That amendment was declaratory, and intended to clarify the Act and remove the confusion of conflicting de-

cisions. It obviously relates to proceedings under the prior Act as well as to the new chapter VIII. It makes no distinction between leases with indemnity covenants and those without. The broad rule we contend for is that declared by the amendment.

ARGUMENT

Our method of approaching the questions presented will be to enumerate the grounds on which the United States Circuit Courts of Appeals for the Second and other Circuits have rejected claims of this kind; then to review the decisions of this Court on the subject, to show that those grounds have been disapproved; and, finally, to present what we consider the sound governing principles.

I.

The grounds for the decision in *In re Roth & Appel*, on authority of which the petitioners' claims were disallowed, which were the contingent nature of the claims, and the alleged impossibility of liquidating them have been removed by decisions of this court.

The court below rejected these claims on the authority of its own decision in *Re Roth & Appel*, 181 Fed. 667, rendered in 1910. That case held that Section 63(a)(4) of the Bankruptcy Act, to the effect that debts may be proved which are "(4) founded upon an open account, or upon a contract express or implied", should have read into it the requirement in Section 63(a)(1) that the debt must be a fixed liability absolutely owing and not contingent at the time of the filing of the petition. It also suggested that the covenant to pay rent is extinguished

by resumption of possession by the landlord. In that case the court suggested contingencies in the following words:

> "The occupation of the land is the consideration for the rent. If the right to occupy terminate, the obligation to pay ceases. Consequently, a covenant to pay rent creates no debt until the time stipulated for the payment arrives. The lessee may be evicted by title paramount or by acts of the lessor. The destruction or disrepair of the premises may, according to certain statutory provisions, justify the lessee in abandoning them. The lessee may quit the premises with the lessor's consent. The lessee may assign his term with the approval of the lessor, so as to relieve himself from further obligation upon the lease. In all these cases the lessee is discharged from his covenant to pay rent. The time for payment never arrives. The rent never becomes due. It is not a case of *debitum in praesenti solvendum in futuro.* On the contrary, the obligation upon the rent covenant is altogether contingent."

It also said:

> "* * * Indeed, looking at the claim as it existed either at the time of the petition or the adjudication, it was altogether contingent in its nature:
>
> (1) It was uncertain, as just pointed out, whether the lessor would re-enter and terminate the lease.
>
> (2) In case the lease was terminated, it was uncertain whether there would be any loss in rents. If the rent received by the land-

lord from the new tenant equaled or exceeded that stipulated in the lease, there would be no loss, and, consequently, no foundation for any claim upon the indemnity covenant.

In rejecting these claims on authority of *In re Roth & Appel,* the court below was confronted with decisions of this Court rendered since *In re Roth & Appel* was decided, particularly *Maynard v. Elliott,* 283 U. S. 273. Of its former decision the court below said:

> "When the situation came before us in *Re Roth & Appel,* 181 Fed. 667, under a lease like that at bar, we disallowed the claim. The ground for our action was that section 63a(4) incorporated the phrase 'absolutely owing,' of section 63a(1) and that the claim was contingent because, upon petition filed, it was uncertain whether the lessor would re-enter at all, and again, whether if he did, there would be any loss, and, if so, how much. Our interpretation of section 63(a)(4) has now been expressly overruled in *Maynard* v. *Elliott,* 283 U. S. 273, and our decision must rest upon the ground that, though the contingency of the claim is no objection to its proof, it is practically too uncertain to be liquidated."

The lower court was right in saying that the element of contingency as a ground for the decision in *In re Roth & Appel* was removed by *Maynard* v. *Elliott, supra.* It could have added that it was removed in 1915 by *Williams* v. *U. S. Fidelity Co.,* 236 U. S. 549. The majority of the lower court adhered to the doctrine of *In re Roth & Appel,* feeling that it was bound by the rule of *stare decisis,* notwithstanding its principal ground had been removed by the

decisions of this Court. Judge Learned Hand, who wrote the opinion, said:

> "For myself, while I recognize the force of this application of *stare decisis,* it seems to me that the basis of the doctrine disappears once contingent claims are held to be provable. That has now been authoritatively declared, and I think that we should make the necessary adjustments."

The lower court conceded that the only ground left for rejection of the claims was that they were too uncertain to be liquidated, but this ground also had been swept away by many decisions. Moreover, as to this ground, Judge Hand said:

> "Certainly I have no more compunction in assessing the future value of realty, than that of chattels. The periods involved are indeed apt to be longer, but the fluctuations are less rapid. Some chances must be taken, but that is often so."

In *William Filene's Sons Co.* v. *Weed,* 245 U. S. 597, where an equity receiver had been appointed for a corporation tenant, and the landlord's claim for damages for loss of future rental was founded on a liquidated damage clause in the lease providing that the loss should be the difference between the rental value and rent reserved, it was said that this measure was "upon a footing that was familiar and fair."

Under the English bankruptcy acts, which have made provable landlords' claims for damages for loss of future rents on the bankruptcy of the tenant, and disaffirmance by the trustee, the difference between the rent reserved and the rental value has been accepted

as an adequate method of liquidating the claim. (*Ex Parte Blake,* 11 Ch. Div. 572 [1879]; *Ex Parte Llynvi Coal and Iron Co., In re Hide,* L. R. 7 Ch. App. 28; *In re Panther Lead Co.* [1896], 1 Ch. Div. 978; *In re Carruthers,* 15 Reports 317, 2 Mansons 172 [1895].)

In all such cases the real question is not the determination of the actual future loss, which would have to be postponed to await developments, for it is the present value of the contract which a creditor may prove in insolvency proceedings, both bankruptcy and equity, just as it is the measure of the amount of damages which a plaintiff may recover in an action upon anticipatory breach of contract.

As the Court below said, in *Pennsylvania Steel Co.* v. *New York City Ry. Co.,* 198 Fed. 721 (a case which this Court cited with approval in the *Chicago Auditorium* case), holding that the damages suffered because of the insolvent's default on a forward contract were susceptible of present ascertainment:

> "The facts stand out for themselves. It is manifest that the Metropolitan Express Company met a serious loss . . . The Metropolitan Railway Company and its lessee, the City Company, became insolvent and their railroads went into the hands of receivers. The result was that the Express Company, without any fault on its part or on the part of its assignee, lost the benefit of this contract" (at pp. 742-743).
>
> ". . . Manifestly the claimant was entitled to recover the value of its contract" (p. 745).

The contract in question had thirteen years to run at the time of termination and it appears from the opinion that the profits under it had fluctuated widely during the term of its existence.

In *Samuels* v. *E. F. Drew & Co.*, 292 Fed. 734, the Court below in discussing the amount provable in an equity receivership proceeding by a claimant deprived of an advantageous forward contract by the insolvency of the defendant said:

> "The law seeks to give to the injured person the value of the contract of which he has been deprived, no more and no less, and the question here is: What was that contract right worth on October 30, 1920? (the date of the appointment of Receivers) And the answer is that such sum is to be determined by taking the difference between the contract and market prices on the date of the breach for the same quality of goods not for immediate delivery but for delivery at the time and place specified in the contract."

The rule is analogous to the method of ascertaining damages in anticipatory breach of contract actions, stated by this Court in *Roehm* v. *Horst,* 178 U. S. 1, 21:

> ". . . he (a contractor injured by anticipatory breach) may show what was the value of the contract by showing for what price he could have made subcontracts . . .
>
> In this case plaintiffs showed at what prices they could have made subcontracts for forward deliveries according to the contracts in suit, and the difference between the prices fixed by the contracts sued on and those was correctly allowed."

The formula using the difference between the rent reserved and rental value as a reasonably definite way of ascertaining the damage in liquidating the claim has been stated in no more clear and simple language than in *Kalkhoff* v. *Nelson,* 60 Minn. 284, in which case

a tenant corporation had gone into receivership in dissolution proceedings, and the claim of its landlord for damages for loss of future rents was allowed. The court said:

> "It is clear that the corporation must be held liable in damages for this total breach of its executory contract to pay the rent reserved in the lease for the full term. It is true, the damages are unliquidated and that it cannot be shown with absolute certainty that the appellants, except for the breach of the contract by the corporation, would have completely executed the contract on their part so as to become entitled to its full benefits; but the same difficulties are presented in a greater or less degree in all actions for the recovery of damages for the breach of executory contracts. Any difficulties, real or supposed, in ascertaining the damages in this case, cannot defeat the action."

(See, also, *Oldfield* v. *Angeles' Brewing Co.*, 62 Wash. 260; *Clarkson* v. *Skidmore*, 46 N. Y. 297; *McGraw* v. *Union Trust Co.*, 135 Mich. 609.)

The same value, that is, the difference between rental value and rent reserved, is placed upon a loss indemnity clause. In the *Filene* case this Court cited as an authority among others for the proposition that that formula "liquidated the damages upon a footing familiar and fair" the case of *Reading Iron Works—Sweatman's Appeal*, 150 Pa. St. 369, involving the claim of a landlord, for damages in an insolvency proceeding founded upon a covenant of indemnity against loss, where the Court said (p. 375):

> "The present value of the loss to be sustained for the remainder of the term may be ascertained and the damages liquidated . . . It is for the loss he suffers by reason of the

difference of the rentals now obtainable . . . and the rental agreed upon . . ."

The court below has itself destroyed the argument that the difficulty in liquidating the claim is a reason for rejecting the claim. In *Re Mullings Clothing Co.*, 238 Fed. 58 (certiorari denied, 243 U. S. 635), where there was an anticipatory breach of an executory contract for a lease by the prospective tenant, who thereafter went into bankruptcy, the court held that there was a provable claim on a contract under Section 63(a)(4) of the Bankruptcy Act.

The difficulty in ascertaining the damages for breach by a prospective tenant of his contract to enter into a lease is no less than in liquidating the value of the lease after it is made. In either case, damages must be measured by the difference between rental value and the rent contracted for.

Of the decisions below, it may, therefore, be said that the court itself admitted that the principal ground for its former decision disallowing such claims had been obliterated by decisions of this Court. We think the other ground it clung to—the difficulty of ascertaining the damage—has not only been obliterated by decisions of this Court and other courts, but by the lower court itself. Nothing is left of the doctrine of *Re Roth & Appel.* The lower court should not have stood on the doctrine of *stare decisis,* when the principles of its former decisions had been disapproved by this Court.

II.

Decisions in other Circuits.

The decisions in other Circuits show confusion and conflict. The court below said that "the doctrine

of *Roth & Appel* is the law in five other circuits, the First, Fifth, Sixth, Eighth and Ninth", and that "the rule in the Third and Seventh Circuits is otherwise". The leading cases in the various Circuits are as follows:

FIRST CIRCUIT—

McDonnell v. *Woods,* 298 Fed. 434;
Slocum v. *Soliday,* 183 Fed. 410.

SECOND CIRCUIT—

In re Roth & Appel, 181 Fed. 667;
Re Mullings Clothing Co., 238 Fed. 58 (C. D. 243 U. S. 635);
Re Marshall's Garage, 63 Fed. (2nd) 759;
Manhattan Properties, Inc. v. *Irving Trust Co.,* 66 Fed. (2nd) 470;
Brown v. *Irving Trust Co.,* 66 Fed. (2nd) 473.

See:

Kottler v. *New York Bargain House Inc.,* 242 N. Y. 28, decided on the basis of *Roth & Appel.*

THIRD CIRCUIT—

In re Keith-Gara Co. (D. C.), 203 Fed. 585;
In re Keith-Gara Co. (C. C. A.), 213 Fed. 450;
In re Orne, 12 Fed. 779 (D. C. 1882);
South Side Trust Co. v. *Watson,* 200 Fed. 50;
Rosenblum v. *Uber,* 256 Fed. 584;
Electric Appliance v. *Ellis,* 4 Fed. (2nd) 108;

In re Schechter, 39 Fed. (2nd) 18;
In re Caloris Mfg. Co., 179 Fed. 722 (1910).

FIFTH CIRCUIT—

Trust Co. of Georgia v. *Whitehall Holding Co.,* 53 Fed. (2nd) 635;
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Lontas v. *Coppard,* 246 Fed. 803;
Lerner Stores Corp. v. *Electric Maid Bake Shops,* 24 Fed. (2nd) 780;
Orr v. *Neilly* (Nov. 7, 1933, C. C. A. 5th).

SIXTH CIRCUIT—

Wells v. *Twenty-First St. Realty Co.,* 12 Fed. (2nd) 237;
Lamson Consol. Store Service Co. v. *Bowland,* 114 Fed. 639;
In re Miller Bros. Grocery Co., 219 Fed. 851;
Schneider v. *Springmann,* 25 Fed. (2nd) 255.

SEVENTH CIRCUIT—

In re Desnoyers Shoe Co., 227 Fed. 401 (C. D. 239 U. S. 649);
In re Chakos, 24 Fed. (2nd) 482;
In re National Credit Clothing Co., 66 Fed. (2nd) 371.

EIGHTH CIRCUIT—

Watson v. *Merrill,* 136 Fed. 359;
Britton v. *Western Iowa Co.,* 9 Fed. (2nd) 488.

NINTH CIRCUIT—

Colman Co. v. *Withoft,* 195 Fed. 250.

We have not found decisions of the Circuit Court of Appeals on this subject in the Fourth or Tenth Circuit.

It is beyond the reasonable limits of this brief here to analyze all these decisions. Their general tenor may be summarized. In the six circuits, including the Second, which hold the landlords' claim for damages for loss of future rent not provable in bankruptcy, the grounds variously assigned are:

(1) That the claim is subject to contingencies and must be rejected because the provision in Section 63(a)(1), that to be provable the debt must be a fixed liability absolutely owing at the time of the petition, is to be read into Section 63(a)(4) allowing claims on contracts express or implied.

(2) That because of the contingencies involved the amount of damage is not reasonably susceptible of ascertainment.

(3) That rent is a consideration for the use of the land and that if the landlord resumes possession under any conditions, it extinguishes the covenant to pay rent.

Many of the cases deal with leases containing indemnity covenants under which the landlord, in case of default, has a right to re-enter and relet, in which case the tenant covenants to indemnify him against loss. Such covenants are personal covenants to indemnify and not covenants to pay rent, and, therefore,

not extinguished by re-entry. The *ipso facto* covenant is one to the effect that simultaneously with the filing of the petition in bankruptcy, the lease shall automatically terminate and the tenant be bound to pay the landlord's loss represented by the difference between rent reserved and rental value for the remainder of the term. This clause was designed to remove the element of contingency, to make the claim absolute with the filing of the petition and to substitute the personal covenant of indemnity for the covenant to pay rent.

A contingency often mentioned is that the trustee may affirm the lease, but that is present in the case of any executory contract. *Central Trust Co.* v. *Chicago Auditorium Association,* 240 U. S. 581.

An examination of these decisions justifies the statement of Judge Hough (*Roth & Appel* [D. C.] 174 Fed. 64) that the whole subject has been left by the lower courts in "hopeless confusion". No consistent rule has been developed by the lower courts.

In *Re Caloris Mfg. Co.* (D. C.), 179 Fed. 722, the court, after holding such a claim provable, said:

> "I cordially agree with Judge Hough that the conflicting decisions on this subject are in a state of 'hopeless confusion' and that an authoritative decision is much to be desired. Certainly, neither he nor I can give it, and it will probably need the intervention of the Supreme Court before the inferior tribunals will know what rule to obey."

Most of the leading decisions of the lower courts were rendered before the decisions of this Court, hereafter referred to.

III.

The correct rule is to be found in the Bankruptcy Act and in the decisions of this court.

The question is one of interpretation of the statute.

Congress admittedly has power in establishing a uniform bankruptcy system to make a landlord's claim against his bankrupt tenant for damages for loss of future rent a provable claim, and to provide for the discharge of the bankrupt from liability for future rents, regardless of whether there are or are not special covenants, such as indemnity agreements, acceleration provisions or so-called *ipso facto* clauses.

The only question here is whether it has intended that such claims shall be proved and discharged.

The claim is fairly within the words of the statute. Section 1(11) provides:

> "'Debt' shall include any debt, demand or claim provable in bankruptcy."

Section 17 provides:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts", with exceptions not here material.

Section 63 provides:

> "Debts of the bankrupt may be proved and allowed against his estate which are * * * (4) founded upon an open account, or upon a contract express or implied; * * *
>
> "(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against the estate."

A lease is a contract. That the claim is unliquidated, forms no obstacle to its allowance, and the fact that the contract is executory or its performance contingent, is no obstacle.

The lower courts have become involved in a maze of technicalities and distinctions based on ancient maxims of the law of landlord and tenant and developed by indemnity clauses, re-entry clauses, *ipso facto* clauses, acceleration clauses, liquidated damage clauses, and a variety of other covenants contained in modern leases. They have to a large extent lost sight of fundamentals and of the purposes of the Bankruptcy Act, and of the fact that Congress has power to and may have intended that such claims should be allowed, the tenant discharged from liability for future rents, and the landlord allowed to share with other creditors in the distribution of assets.

The decisions of this Court afford a sure guide to sound conclusions.

In *Williams* v. *United States Fidelity and Guaranty Co.*, 236 U. S. 549, decided in 1915, the opinion furnishes a chart and compass for the solution of the question. In that case a surety sued his principal for indemnity, after the principal's discharge in bankruptcy, and the question was whether the surety could have proved his claim in bankruptcy and participated in the distribution of the assets. It was contended that the claim could not have been proved, because at the date of filing the petition the principal had not yet been called upon to indemnify his surety, as the surety had not yet responded on the bond, and therefore the claim was contingent and not absolutely owing, although on a contract express or implied described in Section 63(a)(4). The court said:

> "It is the purpose of the Bankrupt Act to convert the assets of the bankrupt into cash

> for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortune. (Citing cases.) And nothing is better settled than that statutes should be sensibly construed, with a view to effectuating the legislative intent."

After quoting the provisions of the statute we have mentioned above, the court continued:

> "Within the intendment of the law provable debts include all liabilities of the bankrupt founded on contract, express or implied, which at the time of the bankruptcy were fixed in amount or susceptible of liquidation."

In *Central Trust Co. of Illinois* v. *Chicago Auditorium Association,* 240 U. S. 581, arising in a bankruptcy proceeding, it appeared that the Scott Transfer Company was adjudged a bankrupt on a petition filed July 22, 1911. On February 1st of that year the Chicago Auditorium Association had made a contract with the Transfer Company for a term of five years, giving the Transfer Company the baggage and livery privilege of the Auditorium Hotel, for which the Transfer Company agreed to pay stated sums in monthly instalments during the term of the arrangement. The contract contained two special provisions. In one, the Auditorium Association reserved the right to terminate the contract on six months' notice at its election, if the service was not, in its opinion, satisfactory, or if there was a change in the management of the hotel, and in case of exercise of that privilege, it was provided that both parties should be released from further liability and the concession cancelled. Another provision authorized the Association, in the

event of default by the Transfer Company, to terminate the privilege without releasing the Transfer Company from liability, in which case the latter would remain liable for the full amount of the monthly sums stipulated to be paid by it. At the time of the bankruptcy the contract had four and one-half years to run. The trustee disaffirmed the contract. The Association did not insist on the contract penalty but filed a claim for damages based on the difference between the future contract payments and the amount for which it had relet the privilege to another. After referring to the doctrine of anticipatory breach of contracts, the court said:

> "There is no doubt that the same rule must be applied where a similar repudiation or disablement occurs during performance. Whether the intervention of bankruptcy constitutes such a breach and gives rise to a claim provable in the bankruptcy proceedings is a question not covered by any previous decision of this court, and upon which the other Federal courts are in conflict. * * * The immediate effect of bankruptcy was to strip the company of its assets, and thus disable it from performing. * * * It is argued that there can be no anticipatory breach of a contract except it result from the voluntary act of one of the parties, and that the filing of an involuntary petition in bankruptcy, with adjudication thereon, is but the act of the law resulting from an adverse proceeding instituted by creditors."
>
> * * * * * * *
>
> "In short, it must be deemed an implied term of every contract that the promisor will not permit himself, through insolvency or acts of bankruptcy, to be disabled from making performance; and, in this view, bankruptcy pro-

ceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt, in violation of his engagement. It is the purpose of the Bankruptcy Act, generally speaking, to permit all creditors to share in the distribution of the assets of the bankrupt, and to leave the honest debtor thereafter free from liability upon previous obligations. Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the Act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in bankrupt estates, while the bankrupts themselves, as a necessary corollary, were left still subject to action for non-performance in the future, although without the property or credit often necessary to enable them to perform. We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement, within the doctrine of *Roehm* v. *Horst, supra.*

The claim for damages by reason of such a breach is 'founded upon a contract, express or implied,' within the meaning of §63a-4, and the damages may be liquidated under §63b."

The court then went on to consider the action of the lower court in denying damages, except such as accrued within six months after the filing of the petition, based upon the ground that the contract reserved to the Association the option to revoke it on six months' notice, and said:

> "The right reserved to the Auditorium Association to cancel and revoke the privileges was reserved for its benefit, not that of the grantee of those privileges."

It held that there was no presumption that the Association would have cancelled the contract, and held that the claim was provable for the damages for the full remaining period of the contract.

William Filene's Sons Co. v. *Weed,* 245 U. S. 597, involved the provability of a claim in an equity receivership. The insolvent was a tenant under a lease, the term of which had some years to run. The receiver elected not to assume the lease, and the landlord re-entered pursuant to leave granted by the court. The lease contained a provision that upon its termination for default, the lessee would pay to the lessor as damages the difference between the rental value and the rent reserved for the residue of the term. The court held that the claim was allowable in the equity receivership. It pointed out that the case did not involve the interpretation of the bankruptcy law, saying:

> "When a statutory system is administered the only question for the courts is what the statutes prescribe. But when the courts without statute take possession of all the assets of a corporation, under a bill like the present and so make it impossible to collect debts except from the court's hands, they have no warrant for excluding creditors, or for introducing supposed equities other than those determined by the contracts that the debtor was content to make and the creditors to accept."

This statement was in answer to a contention that such a claim was not a provable claim in bankruptcy, because the court said:

> "The Circuit Court of Appeals seems to have considered also that the filing of the bill

had the same effect as a petition in bankruptcy in stopping claims that like this were not provable at that date."

The respondents may take some comfort from that statement, but it was an assumption and not a decision of a question before the court.

To avoid the contention that the re-entry cancelled the obligation to pay rent under ancient common-law rules, the court said:

> "The contract was not that all the rent for the term should become presently due, it was not for rent at all, but was a personal covenant that liquidated the damages upon a footing that was familiar and fair."

In *Gardiner* v. *William S. Butler & Co.,* 245 U. S. 603, argued and decided on the same day as the *Filene* case, and arising out of the same receivership proceedings, another landlord made a claim for damages for loss of future rents. In the part of the opinion relating to a lease which did not contain an indemnity covenant, the court said:

> "In substance it is for damages similar to those held allowable under the former lease, but simply on the ground that the petitioner has lost the benefit of his bargain from the time of his reentry, the lease not containing any clause stipulating for such an allowance. Of course there are plausible analogies for the contention. But the law as to leases is not a matter of logic *in vacuo;* it is a matter of history that has not forgotten Lord Coke. Massachusetts has followed the English tradition and we believe that it is the general under-

> standing in that State that in the absence of statute or express contract a lessor who has terminated a lease and evicted the tenant has no further claim against the lessee."

That part of the *Gardiner* case dealing with the second lease is authority for the proposition that in an equity receivership where the lease contains merely a re-entry clause and not an indemnity clause, the landlord's claim for damages for loss of future rents will not be allowed. This decision does not settle the question in bankruptcy proceedings. Whatever the rule may be in equity receiverships, the operation of the Bankruptcy Act presents a different question. As the court pointed out in the *Filene* case:

> "When a statutory system is administered the only question for the courts is what the statutes prescribe."

Congress has power to provide a different rule in bankruptcy. It may, as a matter of policy, for a proper administration of the bankruptcy system, provide that all obligations of the bankrupt on leases entered into before bankruptcy, shall be discharged in bankruptcy, and that the landlord, to the extent of the damage he suffers, may share in the distribution of assets.

Next comes the case of *Kothe* v. *R. C. Taylor Trust,* 280 U. S. 224 (1930). There the tenant had become bankrupt and the landlord filed a claim for the full amount of the future rents. The lease contained a clause, providing that the filing of any petition in bankruptcy by or against the lessee

> "shall be deemed to constitute a breach of this lease, and thereupon, ipso facto and with-

> out entry or other action by the lessor, this lease shall become and be terminated; and, notwithstanding any other provisions of this lease the lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof."

The landlord made no claim for damages measured by the difference between the rent reserved and the rental value. He planted himself on the stipulation for liquidated damages. The court refused to enforce the covenant, on the ground that the clause in the lease imposed a penalty and that the stipulation for payment of the entire reserved rent, without any diminution for rental value or probable rentals from new tenants was unenforceable, saying:

> "But agreements to pay fixed sums plainly without reasonable relation to any probable damage which may follow a breach will not be enforced. This circumstance tends to negative any notion that the parties really meant to provide a measure of compensation—'to treat the sum named as estimated and ascertained damages.'"

In that case, if the contention of the respondents here is sound, the court might have rejected the claim on the broad ground that a landlord's claim for damages for loss of future rentals was not a provable claim in bankruptcy. It is significant that the court confined itself to deciding the exact point presented, and based its decision on the ground that the claimant asked only for the enforcement of the penalty clause.

Next comes *Maynard* v. *Elliott*, 283 U. S. 273, arising under the Bankruptcy Act. In that case the

court allowed a claim where the claimant was the holder of promissory notes, and the bankrupt was an endorser, the notes not having matured at the time of filing the petition in bankruptcy and one of them not having matured within the time to file claims. The court below had held that the liability upon the endorsement was "not a provable claim because contingent." After quoting from the Bankruptcy Act, the court said:

> "Although the omission of any reference to contingent claims in §63 of the present Act has led to some confusion and uncertainty in the decisions, it is now settled that claims founded upon contract, which at the time of the bankruptcy are fixed in amount or *susceptible of liquidation,* may be proved under subdivision (a)(4) of that section, although not absolutely owing when the petition is filed. *Williams* v. *U. S. Fidelity Co.,* 236 U. S. 549; *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581." (Italics ours.)

The court further said:

> "The obligation of an endorser is at least a 'claim,' and hence a debt so far as defined by §1(11); and the language of §63, which permits proof of a claim 'founded * * * upon a contract, express or implied,' is broad enough to embrace the liability of an endorser upon negotiable paper which has not matured at the time of the adjudication."

In answer to the contention that the provision in Section 63(a)(1) that the debt must be absolutely owing at the time of the filing of the petition should be read into Section 63(a)(4), the court said:

> "Respondent argues that (a)(4) must be so

> read, since, otherwise, the limitation in (a)(1) would be practically without effect. See *In re Roth & Appel,* 181 Fed. 667; *In re Hutchcraft,* 247 Fed. 187. But this contention was rejected by the decision in *Williams* v. *U. S. Fidelity Co., supra.*"

The court further said:

> "Possible doubts as to the meaning of the section should be resolved in the light of the purpose of the Act 'to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes.' *Williams* v. *U. S. Fidelity Co., supra,* p. 554; *Central Trust Co.* v. *Chicago Auditorium, supra,* p. 591."

Thus, the court definitely rejected the arguments that contingent claims could not be proved under Section 63(a)(4), and expressly disapproved the rule to that effect previously announced in *Re Roth & Appel,* 181 Fed. 667. It also pointed out that the rule in *Re Roth & Appel* had been previously rejected by this Court as far back as 1915 in *Williams* v. *U. S. Fidelity Co., supra.*

It left only the qualification that the contingency of the bankrupt's obligation "may be one beyond the control of the creditor and dependent upon an event so fortuitous as to make it uncertain whether liability will ever attach" and "the contingency may be such as to make any valuation of the claim impossible". The manner of the reference to *Atkins* v. *Wilcox, supra,* is not such as to constitute an approval of that decision.

IV.

The principles announced in the decisions of this court lead to the conclusion that on bankruptcy of the tenant, the landlord's claim for damages for loss of future rent is provable in and discharged by bankruptcy proceedings.

The principles laid down in *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, lead inevitably to this conclusion and have not been modified, but have been reiterated by later decisions. The court there said:

> "Within the intendment of the law provable debts include all liabilities of the bankrupt founded on contract, express or implied, which at the time of the bankruptcy were fixed in amount or susceptible of liquidation."

It laid emphasis on the proposition that the purpose of the Act was to "relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." To deny provability of such claims defeats the purposes of the Act. It leaves the bankrupt liable indefinitely for the future on obligations for payment of rent incurred before bankruptcy. It leaves it optional with the landlord to continue to hold the bankrupt on his covenant to pay rent.

On the other hand, it denies to the landlord the right to participate with other contract creditors who have suffered loss through the bankruptcy in the distribution of assets. The bankruptcy strips the tenant of assets and disables him for all practical purposes from performance. If the rental value for the balance of the term is less than the reserved rent, the

landlord, as the result of bankruptcy, suffers as definite a loss as any other claimant whose claim is based on an executory contract involving future performance.

If the tenant, as in the cases at bar, be a corporation, the result to the landlord of denying provability is more harsh. True, the bankrupt corporation may remain liable under the lease, notwithstanding the bankruptcy proceedings, but unlike an individual, a bankrupt corporation rarely is rehabilitated and if the claim is not allowed in bankruptcy, the landlord is left to pursue the empty husk of a bankrupt corporation without assets and is denied participation in the distribution of the bankrupt's property. For all practical purposes the landlord's claim is discharged. It is true the landlord may resume possession of the land, but the value of what he resumes is depreciated below the rent contracted, otherwise he would have no claim. He suffers as definite a loss as any creditor. Under such a system a corporation with sufficient assets to pay one hundred cents on the dollar to all other classes of creditors, may, for the purpose of escaping liability on leases, file a voluntary petition in bankruptcy. The persons interested in the corporation may organize a new one to take over the assets at bankruptcy sale at a price which will satisfy other creditors or pay them in full, and then continue the business and leave the landlord to pursue a defunct corporation, with only the possibility of mitigating his loss by re-renting the property for less than the original lease provided. How this system works is well stated in an article on "Rent Claims in Bankruptcy," 33 *Columbia Law Review* 213 (February, 1933) as follows:

"The three years of deflation last past have

witnessed a drastic decrease in rentals and incomes. Leases made in boom days, whether for residence or business, have become major economic burdens. Numerous individuals have turned to bankruptcy, popularly conceived as a cure for all honest debts and liabilities, to find that the courts have construed the Bankruptcy Act as not releasing debtors from leasehold obligations: the insolvent individual lessee remains liable on his lease after bankruptcy, as overburdened as before. Moreover the many chain store bankruptcies engineered more or less openly for the purpose of escaping from burdensome leases without compensating the landlords, have awakened interest in the status of claims in bankruptcy for rent accruing after the filing of the petition. It is, of course, not unnatural for landlords to find little comfort in their theoretically undischarged rights against defunct corporations when they are excluded from sharing in the assets."

To the same effect see 7 *University of Cincinnati Law* Review 162.

V.

There is no practical or sound reason consistent with the purposes of the Bankruptcy Act why any distinction should be made between the claim of a landlord for damages for loss of future rents and claims founded on other types of executory contracts.

Claims have been allowed on instalment contracts to buy ice (*In re Stern,* 116 Fed. [C. C. A. 2nd] 604); contracts to buy cotton bagging (*Lesser.* v. *Gray,* 236 U. S. 70); instalment contracts to sell rubber (*In re Portage Rubber Co.,* 296 Fed. [C. C. A. 6th] 289);

contracts to buy stock (*In re Pettingill & Co.*, 137 Fed. 143); employment contracts (*Re Schultz & Guthrie*, 235 Fed. 907); annuities (*Cobb* v. *Overman*, 109 Fed. [C. C. A. 4th] 65); and on contracts to make monthly payments similar to rents for the privilege of handling baggage at a hotel (*Central Trust Co. of Illinois* v. *Chicago Auditorium Association*, 240 U. S. 581).

Whatever distinctions there may be technically between realty and personalty, and between rents and other obligations, they have no significance in bankruptcy proceedings.

VI.

There should be no distinction between leases having special indemnity or *ipso facto* covenants and those which have not.

In the cases at bar the leases contain indemnity covenants. It may not be necessary for the Court in these cases to say more than that claims on leases with such covenants are provable. Indeed, it may be to the advantage of these petitioners to have the rule so limited and exclude from participation in the distribution of assets landlords under leases without such covenants, of which no doubt there are many. We contend that at least the claims are provable under the leases disclosed in this record (See Point VII). We feel bound, however, to present the broad view of the law as we see it and are convinced that, for the purposes of the Bankruptcy Act, no such distinction should be made, and that in all cases of bankrupt tenants, bankruptcy should be treated as precipitating a liquidation of the contract, resulting in a discharge of the bankrupt from future liability and the participation by the landlord in the

distribution of assets to the extent of the damage wrought by the disablement of the bankrupt to perform, regardless of whether the lease has an indemnity, acceleration or *ipso facto* clause, or whether it contains merely the old-fashioned re-entry provision.

We have pointed out that the lower courts disallowing these claims have done so on the grounds (1) that they are contingent and not absolutely owing at the time of the filing of the petition, or (2) that the damages of the landlord are too uncertain and not susceptible of liquidation, or (3) that proving a claim for damages implies a resumption of possession by the landlord, and under the ancient law of landlord and tenant a re-entry extinguishes the covenant to pay rent.

The special covenants referred to have been relied on to remove the element of contingency, to endeavor to make claims absolute at the time of the filing of the petition, and also to avoid the objection that a covenant to pay rent is extinguished by the landlord's resumption of possession. On the latter theory, these special covenants have been said to substitute for the covenant to pay rent a personal covenant of indemnity, the liability to perform which is not extinguished as is the rent obligation by re-entry. There is support for this theory in *Gardiner* v. *Butler,* 245 U. S. 603, and in other decisions.

The Bankruptcy Act may be applied, in the way we suggest, without overturning the established technical rules of the law of landlord and tenant.

If the purpose of the Bankruptcy Act is to start the bankrupt afresh and extinguish all obligations on contracts, executory or otherwise, entered into by the bankrupt, that purpose is defeated by holding nonprovable and non-dischargeable a claim for damages for loss of future rent under *any* lease.

If another purpose of the act is to allow contract creditors of the bankrupt to participate in the distribution of assets to the extent of their losses resulting from the bankruptcy, that purpose is defeated by excluding claims for damages for loss of future rents under any form of lease.

One of the cases disallowing such claims on the theory that resumption of possession extinguished the liability for rent, is *Watson* v. *Merrill,* 136 Fed. Rep. 359 (C. C. A. 8th). In that decision it was also said that the claim would have been disallowed, even if there had been a special indemnity covenant, because the claim would have been contingent, but that statement was *obiter* although since followed in that circuit.

One fallacy in the argument that the claim of the landlord is not provable where the lease contains no special covenants of indemnity rests on the assumption that the resumption of possession by the landlord in case of the bankruptcy of the tenant is the voluntary act of the landlord, and overlooks the fact that resumption is forced upon him by the bankruptcy which strips the tenant of his assets and ability to perform and compels the landlord to resume possession to diminish his loss. It draws an artificial and wholly impractical distinction between leases and other executory contracts. If a bankrupt has previously made a contract by which he agrees to take and pay for goods to be delivered in the future, performance of his promise to pay is conditioned on the delivery of the merchandise, which, in case of his bankruptcy, never will be delivered. *For the purposes of the Bankruptcy Act,* the argument that the obligation to pay rent no longer forms a basis for awarding damage because the consideration for rent is the possession of the

land, is no more forcible than the argument that the obligation of the bankrupt to pay for the goods on future delivery is extinguished because the goods will not be delivered to an insolvent purchaser, unable to pay. It will be pointed out below (Point IX of this brief) that, under the English bankruptcy system, for more than half a century, in cases of bankruptcy of tenants, claims of landlords for damages for loss of future rents have been allowed without regard to the presence or absence of special indemnity or *ipso facto* clauses and without regard to the old common law rule that re-entry extinguishes the covenant to pay rent, and in the English cases damages have been liquidated by ascertaining the difference between the rent reserved for the balance of the term and the rental value.

We submit that the application of the principles laid down in *Williams* v. *United States Fidelity Co.*, 236 U. S. 549, leads inevitably to the conclusion that the proper interpretation of the Bankruptcy Act requires the allowance of these claims regardless of the presence of special covenants.

With contingency not an objection to allowance, and with the claim susceptible of liquidation under established rules, the only point left in respect of which special covenants of indemnity could be material is the doctrine that rent issues out of the land.

This point is that rent is the consideration for possession, and when possession is resumed by the landlord, the covenant to pay rent is terminated, and as the allowance of a claim for damages for loss of future rents necessarily involves resumption of possession by the landlord, the only covenant on which a claim could be based is cancelled, unless there is an

indemnity covenant substituted for the covenant to pay rent. This argument ignores the fundamental purpose of the Bankruptcy Act as announced in *Williams* v. *U. S. Fidelity Co.*, and *Maynard* v. *Elliott, supra,* which is to absolve the bankrupt from all obligations and to allow those who have subsisting contracts with him to participate in the distribution of his assets to the extent of their loss.

The point is acutely presented by comparison of the result in *Central Trust Co. of Illinois* v. *Chicago Auditorium Association, supra,* with the situation in this case. The Hotel Association had granted to the Transfer Company for a period of years the exclusive privilege of handling guest baggage, and a license to go upon the premises for that purpose, for which the grantee agreed to pay stipulated amounts monthly, similar to rents. In that case the enjoyment of the privilege was the consideration for the stipulated monthly payments. When on bankruptcy of the Transfer Company the right and privilege were terminated and resumed by the Hotel Company, the monthly payments by the licensee conditioned on the enjoyment of the privilege stopped just as under a lease of realty, resumption of possession by the landlord deprives the tenant of the consideration of the rent.

For any purpose germane to the bankruptcy system, what reason is there for allowing the hotel's claim for damages in that case, measured by the difference between the stipulated payments and the amount for which the privilege could be let to some other person for the balance of the contract period, and disallowing an analogous claim on a lease of realty?

The question narrows down to the contention that in the application of the bankruptcy law a distinction must be made between a claim for damages for loss of future rents under a lease of personalty and one for loss of future rents under a lease of realty.

If a landlord's claim is rejected because the lease contains no indemnity clause, he has the option to pursue the bankrupt indefinitely. No other tenants may be available. The landlord may elect not to reenter. On our theory, the landlord has no option. The future liability of the tenant is extinguished by the discharge in bankruptcy.

With due respect for Lord Coke's quaintly spelled maxim and for the ancient law, we submit that in the application of the Bankruptcy Act such a distinction has no place. It is highly technical. There is no practical difference between the two cases so far as the purposes of the bankruptcy system are concerned. The Act itself makes no exception of contracts for lease of realty and its purposes are defeated if the claim is not provable and, therefore, not discharged, and if the landlord may pursue the bankrupt after discharge. The distinction loses sight of the fact that it is competent for the Congress, notwithstanding the technical law of landlord and tenant, to absolve every bankrupt tenant from his liabilities, and to allow the landlord a provable claim for his loss. As pointed out in Point IX of this brief, England, the place of origin of our law of landlord and tenant, long ago did that very thing.

VII.

On the narrower view as to the operation of the Bankruptcy Act, the claims involved in these cases are provable because of the special indemnity covenants.

In contending that a proper construction of the Bankruptcy Act makes these claims provable regardless of the presence of special covenants, we have not intended to ask the Court to go beyond the record and decide questions not presented. Our theory is that in clearing up the "hopeless confusion" resulting from decisions of lower Federal courts, this Court will find it desirable to consider fundamentals and announce principles which will inevitably result in the allowance of these claims and make it unnecessary to consider the special covenants.

The question as to the provability of such claims in the absence of special indemnity covenants is presented in many pending bankruptcy proceedings. If not now presented in cases already docketed in this Court, it soon will be, unless this Court announces principles in these cases broad enough to dispose of the whole subject.

Nevertheless, if the Court concludes that the presence of an indemnity clause, with provision for personal liability of the tenant surviving re-entry, is necessary to make such claims provable, the claims in the cases at bar should be allowed. In both leases here involved the parties expressly contracted for personal liability of the tenant to indemnify the landlord for loss of rent consequent upon default or bankruptcy leading to re-entry, and stipulated that resumption of possession of the leased premises by the landlord would not discharge that liability.

Liability on such covenants does not cease upon re-entry, nor does the consideration for it depend upon possession of the premises. It has always been competent for the parties to a lease to contract that re-entry for default shall not release the tenant from liability to make good the landlord's loss. If the Court should reject our broader contentions and apply in bankruptcy proceedings the same rule it has applied in equity receiverships, these claims are provable (*William Filene's Sons Co.* v. *Weed, supra*).

The lease in No. 506 contains an indemnity clause in substantially the form involved in the *Filene* case, except that in the latter case the lease contained a liquidated damage clause adopting the formula which is the ordinary rule for computing the damage, and which is the rule which may be adopted even where some other rule has been contracted for (*Central Trust Co.* v. *Chicago Auditorium, supra; Reading Iron Works, supra*).

The lease in No. 505 contains an indemnity clause in which the tenant agreed to reimburse the landlord from month to month. In so far as such a covenant contemplates a continued liability of the tenant after discharge in bankruptcy, it could not be operative, but nevertheless the covenants of that lease sufficiently reserve a claim against the tenant notwithstanding re-entry.

Although the covenants in both leases provide the same formula in case of bankruptcy as is provided in case of default without bankruptcy, if the provision for future liability of the tenant after bankruptcy is discarded, there still remains the covenant for indemnity in case of default, which satisfies the rule in the *Filene* case. The result is that in both cases the covenant for indemnity may form the basis of the

claim as a substitute for the covenant for rent, and the objection that has sometimes been offered to the provability of such claims, that a rent covenant is extinguished by re-entry, disappears from the case.

If a lease contains, as do these, a personal covenant, surviving re-entry, to indemnify the landlord against loss, we see no ground for distinction between a case where there is a valid liquidated damage clause, such as the *Filene* case, especially where the liquidated damage clause adopts the standard legal rule and one where the ascertainment of the loss is left to the ordinary rules of law.

The argument advanced by the respondents below that one of these covenants provides for ascertainment of the loss in the future, overlooks the rule in bankruptcy proceedings that the present value of such contracts may be liquidated and proved, and that unless claims thereon are provable and are discharged in bankruptcy, one purpose of the Act, which is to start the bankrupt afresh, will be defeated. The argument of the respondents also overlooks the proposition that the question in bankruptcy is the ascertainability of the present value of the contract, and not the determination of actual loss by awaiting the event, and the same question is present in the case of all executory contracts.

In the *Brown* case, No. 506, it appears (R. 21) that an excess of arrears of rent over collections by the claimant from other occupiers of the premises, amounting to $4,404.40, was definitely ascertained before re-entry.

If the tenant's liability under such an indemnity covenant is not provable and therefore not discharged, the basic policy of the Act to give the bankrupt a fresh start in business is thus destroyed.

VIII.

Notwithstanding the rule to the contrary in some circuits there is no reason why this Court should refuse now to hold such claims provable.

(1) Whichever way the question is decided, this Court must overturn the rule applied in some circuits. The fact that there is a numerical superiority of circuits holding against allowance is a minor consideration.

(2) To decide against provability would involve reconsideration and modification of principles established by the decisions of this Court during the last nineteen years.

(3) To sustain provability would overrule no decision of this Court. At most, even if provability is established without regard to indemnity covenants, it would require the qualification of statements made *arguendo* where the point was not here for decision, such as Mr. Justice Pitney's statement in *Central Trust Co.* v. *Chicago Auditorium, supra,* at page 590, where, endeavoring to distinguish that case from claims under leases of real estate, he said:

> "Cases of the latter class are distinguishable, because of the 'diversity betweene duties which touch the realty and the meere personalty.' Co. Litt., 292, b, §513."

(4) The question has never been at rest in any circuit. Litigation on the subject has been continued, owing doubtless to the decisions of this Court.

(5) Under the bankruptcy system in England, the place of origin of our law of landlord and tenant, the technical rules in respect of rent covenants have not prevented allowance of the landlord's claim for loss of future rents.

(6) The argument that holding these claims provable would be unfair to merchandise creditors, because liability for future rents is not disclosed in financial statements is without substance. Other forward contracts, such as for purchase of goods or materials, are not so disclosed.

(7) There is no rule of property involved. The conflict in the lower courts has been one based largely on venue, and the provability of the claim, regardless of the location of the land, has generally been determined by the accidental or deliberate selection of the jurisdiction in which the bankruptcy petition is filed. The owner of a building in Nebraska may have rented one-half to each of two tenants, both of whom may have become bankrupt. If one were declared bankrupt in the third circuit, the landlord's claim on that half of the building would be provable. If the other tenant had filed a petition in bankruptcy in the eighth circuit, that claim would have been held not provable.

In No. 506, the bankrupt, United Cigar Stores Company, is a New Jersey corporation but had its principal place of business in New York. The petition was a voluntary one. Under the Bankruptcy Act, the petition could have been filed either in New Jersey, in the third circuit, where these claims have long been held provable, or in New York, in the second circuit, where the rule has been the other way. The bankrupt chose the second circuit.

IX.

Under the English system, landlords' claims for damages for loss of future rent where tenants become bankrupt have long been provable, regardless of the element of contingency or difficulty in ascertaining the loss and without regard to the presence of special covenants.

As early as 1769 an English judge, although holding not provable a landlord's claim for loss of future rents, remarked:

> "As it [bankruptcy] renders him absolutely incapable of performing the covenant, it would be a hardship upon him, if he should remain still liable to it, when he is disabled by the act of parliament from performing it." *Mayor* v. *Steward,* 4 Burr. 2439 (K. B. 1769).

Parliament and the English courts struggled with the problem in some confusion until finally, by 32 and 33 Vict. c. 71 §23 (1869), the landlord was given a provable claim. The difference between the rent reserved and the rental value was held a fair measure of the loss.

In *Ex Parte Llynvi Coal Co.,* L. R. 7 Ch. App. 28 (1871), it was said:

> "A landlord who finds premises which had been let at a beneficial rent thrown upon his hands, and cannot let them for anything like what he has done before, is entitled to prove exactly in the same way as a servant who has entered into an engagement with a master to employ him for ten years at £500 a year, and who is then suddenly deprived of his employment; in such a case he would be entitled to

prove for £500 a year, minus what he could reasonably get for his services in the market. In the same way a landlord who has made a contract for £500 a year to be paid to him for the use of land, is entitled to claim £500 a year minus what he can get for the land from another tenant" (James, *L. J.*, at p. 32).

See, *Ex Parte Blake,* 11 Ch. Div. 572 (1879).

The English Bankruptcy Act of 1883 (46 and 47 Vict. c. 57) had broad provisions to the effect that bankruptcy precipitates the dissolution and liquidation of all contract liabilities, contingent or otherwise.

Section 37 of that act is as follows:

"(1.) Demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust, shall not be provable in the bankruptcy.

(2.) A person having notice of any act of bankruptcy available against the debtor shall not prove under the order for any debt or liability contracted by the debtor subsequently to the date of his so having notice.

(3.) Save as aforesaid, all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy.

(4.) An estimate shall be made by the trustee of the value of any debt or liability provable as aforesaid, which by reason of its being

subject to any contingency or contingencies, or for any other reason, does not bear a certain value.

(5.) Any person aggrieved by any estimate made by the trustee as aforesaid may appeal to the Court.

(6.) If, in the opinion of the Court, the value of the debt or liability is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt or liability shall, for the purposes of this Act, be deemed to be a debt not provable in bankruptcy.

(7.) If, in the opinion of the Court, the value of the debt or liability is capable of being fairly estimated, the Court may direct the value to be assessed, before the Court itself without the intervention of a jury, and may give all necessary directions for this purpose, and the amount of the value when assessed shall be deemed to be a debt provable in bankruptcy.

(8.) 'Liability' shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money, or money's worth, whether the payment is, as respects amount fixed or unliquidated; as respects time, present or future, cer-

tain or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or as matter of opinion."

The provision for disclaimers by the trustee of executory contracts was as follows:

"55. (1.) Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, but subject to the provisions of this section, may, by writing signed by him, at any time within three months after the first appointment of a trustee, disclaim the property.

Provided that where any such property shall not have come to the knowledge of the trustee within one month after such appointment, he may disclaim such property at any time within two months after he first became aware thereof.

(2.) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of re-

leasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person.

(3.) A trustee shall not be entitled to disclaim a lease without the leave of the Court, except in any cases which may be prescribed by general rules, and the Court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenant's improvements, and other matters arising out of the tenancy as the Court thinks just.

(4.) The trustee shall not be entitled to disclaim any property in pursuance of this section in any case where an application in writing has been made to the trustee by any person interested in the property requiring him to decide whether he will disclaim or not, and the trustee has for a period of twenty-eight days after the receipt of the application, or such extended period as may be allowed by the Court, declined or neglected to give notice whether he disclaims the property or not; and, in the case of a contract, if the trustee, after such application as aforesaid, does not within the said period or extended period disclaim the contract, he shall be deemed to have adopted it.

(5.) The court may, on the application of any person who is, as against the trustee, entitled to the benefit or subject to the burden of a contract made with the bankrupt, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as to the Court may seem equitable, and any damages payable under the order to

any such person may be proved by him as a debt under the bankruptcy.

(6.) The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose.

Provided always, that where the property disclaimed is of a leasehold nature, the court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as under-lessee or as mortgagee by demise except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or under-lessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or

jointly with the bankrupt to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt.

(7.) Any person injured by the operation of a disclaimer under this section shall be deemed to be a creditor of the bankrupt to the extent of the injury, and may accordingly prove the same as a debt under the bankruptcy."

See, *In re Panther Lead Co.* (1896), 1 Ch. Div. 978.

The English Bankruptcy Act of 1914 (4 and 5 Geo. V, c. 59), contains substantially the same provisions, in Sections 30 and 54.

The operation of these provisions as construed by the English courts has been to make provable and dischargeable landlords' claims for loss of future rents, notwithstanding their contingency or any difficulty in estimating the damage and without any regard to the presence of special covenants, or to any ancient theory that rent issues out of the land, or that the covenant to pay rent is extinguished by re-entry. The theory of the English law is that the bankruptcy disables the tenant from performance and if the trustee disaffirms the lease, inflicts a loss on the landlord and precipitates a liquidation of the contract. See also *Ex Parte The Leather Sellers' Co.*, 3 Morrell 126 (Q. B. D., 1886); *Ex Parte Verdi*, 3 Morrell 218 (Q. B. D., 1886); *Hardy* v. *Fothergill*, L. R. 13 App. Cas. 358 (House of Lords 1888); *In re Carruthers*, 15 Reports 317, 2 Mansons 172 (1895).

If the English have applied this system for half a century with success and fairness, notwithstanding liabilities under leases and other executory contracts may not have appeared in the bankrupt's balance sheets, we should have no hesitation for any practical reason in following it.

The English statute allows proof of all claims arising on contracts, executory or otherwise, contingent or not, so long as the claim is susceptible of being liquidated. That is precisely what was said of our law in *Williams* v. *United States Fidelity Co.*, 236 U. S. 549, where the court refused to disallow a claim because it was contingent, and said:

> "Within the intendment of the law provable debts include all liabilities of the bankrupt founded on contract, express or implied, which at the time of the bankruptcy were fixed in amount or susceptible of liquidation."

The English statute prescribing the procedure on disclaimers of executory contracts by the trustee, mentions leases.

Under the English system the landlord has a provable claim only if the trustee in bankruptcy disaffirms the lease, but that is so under the rule we contend for, as in the case of any executory contract.

X.

The amendment to the Bankruptcy Act enacted March 3, 1933 to the effect that "a claim for future rents shall constitute a provable debt and shall be liquidated under Section 63(b) of this Act" is declaratory and intended to remove doubt as to the construction of the prior law and confirms our position.

By the Act of March 3, 1933 Congress added a new Chapter VIII to the Bankruptcy Act. It provided for bankruptcy proceedings for compositions and extensions in the case of individuals and for extensions and reorganizations in the case of railroad corporations. Section 74(a) of Chapter VIII so enacted is as follows:

> "74(a) Any person excepting a corporation may file a petition, or, in an involuntary proceeding before adjudication, an answer within the time limited by Section 18(b) of this Act, accompanied in either case, unless further time is granted, by his schedules, stating that he is insolvent or unable to meet his debts as they mature, and that he desires to effect a composition or an extension of time to pay his debts. The term 'debt' for the purposes of an extension proposal under this section shall include all claims of whatever character against the debtor or his property, including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this Act. Upon the filing of such a petition or answer the judge shall enter an order either approving it as properly filed under this section, if satisfied that such petition or answer com-

plies with this section and has been filed in good faith or dismissing it. If such petition or answer is approved, an order of adjudication shall not be entered except as provided in subdivision (1) of this section: *Provided, however,* That in staying the action for adjudication in an involuntary proceeding the court shall make such stay conditional upon such terms for the protection and indemnity against loss by the estate as may be proper, and that in any other proceeding under this section the court may, as the creditors at the first meeting may direct, impose similar terms as a condition of delaying the appointment of a trustee and the liquidation of the estate. Any person by or against whom a petition is filed shall be referred to in the proceedings under this section as 'debtor'. The term 'creditor' shall include for the purposes of an extension proposal under this section all holders of claims of whatever character against the debtor or his property including a claim for future rent, whether or not such claims would otherwise constitute provable claims under this Act. *A claim for future rent shall constitute a provable debt and shall be liquidated under Section 63(b) of this Act.*" (Italics ours.)

The Court below, conceding but not deciding that this amendment was retrospective and applied to pending proceedings, held that it operated only in proceedings under Chapter VIII and not in proceedings resulting in adjudications in bankruptcy under the prior Act.

In both the present cases the records disclose not only that the petitions had been filed but that the time for proving claims had expired prior to the passage of this Act. There is no reason now to contend that

this statute, if considered as effecting a change in the law, should be held retrospective as to cases like these. The petitions for certiorari did not raise the point. [In *Michaud Realty Co.* v. *Heymann et al.*, trustees of Louis K. Liggett Company, bankrupt, No. 662 October Term 1933, the petition in bankruptcy was filed after the passage of the Act of March 3, 1933.] Indeed the absence of any provision in the amendment respecting pending cases confirms the view that the amendment was declaratory, in which event the question of its retrospective application does not arise.

We are confronted, nevertheless, with the question whether this amendment was intended as a change in the substantive law, and therefore, a legislative declaration that prior to the amendment the law was otherwise. Furthermore, if the amendment was declaratory and not intended to effect a change, its scope must be ascertained. It also shows the trend of legislation.

In *Bailey* v. *Clark*, 21 Wall. 284, the Court said:

> "After controversies had arisen as to the interpretation to be given to the statute, upon the question at issue in this case, between bankers and the government, Congress passed the act of 1872, defining the meaning of the terms 'capital employed', in the one hundred and tenth section, and enacted that they 'shall not include money borrowed or received from day to day in the usual course of business from any person not a partner of, or interested in, the said bank, association, or firm'. This enactment was evidently intended to remove any doubt previously existing as to the meaning of the statute and declare its true construction and meaning. Had it been intended to apply only to cases subsequently arising it would undoubtedly have so provided in terms."

In *Cope* v. *Cope*, 137 U. S. 682, at page 688, the Court said:

> "These several acts of Congress, dealing as they do with the same subject matter, should be construed not only as expressing the intention of Congress at the dates the several acts were passed, but the later acts should also be regarded as legislative interpretations of the prior ones. *United States* v. *Freeman*, 3 How. 556, 564; *Stockdale* v. *Insurance Co.*, 20 Wall. 323."

In *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, the Court said at page 21:

> "As we have no doubt of the meaning of the prior law, the subsequent legislation cannot be regarded as intended to operate to destroy it. Indeed, the latter act is affirmative, and declaratory, and, in effect, only construed and applied the former act. *Bailey* v. *Clark*, 21 Wall. 284; *United States* v. *Freeman*, 3 How. 556; *Cope* v. *Cope*, 137 U. S. 682; *Wetmore* v. *Markoe*, *post*, p. 68. This legislative recognition of the scope of the prior law fortifies and does not weaken the conclusion at which we have arrived."

In *Wetmore* v. *Markoe*, 196 U. S. 68, at page 76, the Court said:

> "In *Dunbar* v. *Dunbar*, 190 U. S. 340, cited *supra*, it was said that this amendment, while it did not apply to prior cases, may be referred to for the purpose of showing the legislative trend in the direction of not discharging an obligation of the bankrupt for the support and maintenance of wife and children. The amendment may also have been passed with a view to

> settling the law upon this subject and to put at rest the controversies which had arisen from the conflicting decisions of the courts, both State and Federal, upon this question. Indeed, in view of the construction of the act in this court in *Audubon* v. *Schufeldt, supra,* it may be said to be merely declaratory of the true meaning and sense of the statute. *United States* v. *Freeman,* 3 How. 556; *Bailey* v. *Clark,* 21 Wall. 284, 288; *Cope* v. *Cope,* 137 U. S. 682, 688."

These considerations make it necessary to ascertain whether the statute is declaratory and also what may be its scope. That it was intended as declaratory and for the purpose of removing the confusion resulting from conflict of decisions, is reasonably clear. Congress must have had in mind the decisions below including those which held such claims provable, as well as the decisions of this Court which support that view. Under these conditions and the cases above cited the amendment should be accepted as declaratory, and as a mere change in the text, to clarify its meaning.

On the face of the statute itself is conclusive evidence that Congress was not of the opinion that under the former law such claims were not provable. The amendatory statute says:

> "The term 'creditor' shall include for the purposes of an extension proposal under this section all holders of claims of whatever character against the debtor or his property including a claim for future rent, *whether or not such claims would otherwise constitute provable claims under this Act.*" (Italics ours.)

Congress would not have referred to them as provable or not if it intended to treat them as not provable under prior law.

Finally if this amendment was intended to effect a change in the law, rather than a mere change in the text to produce clarity, it was important that some provision be made respecting its application to pending proceedings such as one to prevent its application if the time for filing claims had expired but not if a reasonable time remained for that purpose after the passage of the Act. No such provision was made.

The amendment being declaratory and intended to remove doubt arising from conflicting decisions, it remains to determine its scope. The conclusion of the Court below that the sentence, "A claim for future rent shall constitute a provable debt and shall be liquidated under Section 63(b) of this Act", is limited in its operation to procedings under Chapter VIII for compositions and extensions, was not justified for the following reasons:

(1) The language of the clause is explicit and its operation cannot be limited to proceedings under Chapter VIII without disregarding its plain words.

(2) The phrase "provable debt" has a well-defined meaning in the Bankruptcy Act. It is a phrase used in Section 63 of the original Act and elsewhere. In the preceding sentence in Section 74(a) Congress used the expression "including a claim for future rent, whether or not such claims would otherwise constitute provable claims *under this Act*". (Italics ours.) The words "under this Act" show it was speaking of provable claims under the Act and not merely of provable claims under Chapter VIII. It is unreasonable to suppose that Congress used the

phrase "provable debt" in a different sense in the next sentence.

(3) Under the holding of the Court below the provision that a claim for future rent shall constitute a provable debt, at least requires that such claims shall be treated as provable debts in proceedings under Chapter VIII not only for extensions but also for compositions. It is found in the section which relates to compositions as well as extensions. The provision for liquidation under Section 63(b) is significant. Mere extension deals with obligations as they stand. Liquidation is only necessary when payment, by composition or by dividend after adjudication, is to be made. Chapter VIII provides for compositions in precisely the same terms as does the original Bankruptcy Act, and if the view of the lower Court is to be accepted and an individual institutes proceedings under Chapter VIII which lead to a composition, claims for loss of future rent would be provable and paid under the composition agreement, while if the composition is under the original provisions of the Act, the claim would not be provable and would receive no payment under the composition agreement. Congress could never have intended such a result. On the contrary we find in paragraph (m) of Section 74 of the new Chapter VIII the following:

> "In proceedings under this section except as otherwise provided therein * * * the rights and liability of creditors and of all persons with respect to the property of the debtor * * * shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered" etc.

(4) Finally, the legislative history of this Act shows our contention to be sound. The bill, which

afterwards became the Act of March 3, 1933, was HR 14359. Originally passed in the House, it reached the Senate and was considered in that body in committee of the whole on February 24, 1933 (Congressional Record, 72nd Congress, Second Session, pp. 5058, 5059). As Section 74(a) of Chapter VIII then stood, the sentence, "A claim for future rent shall constitute a provable debt and shall be liquidated under Section 63(b) of this Act", was not contained in it. Senator Bratton proposed that sentence, and Senator Hastings, in charge of the bill, said:

> "I inquire of the Senator from New Mexico whether that is not an amendment affecting the rents under the old law. As I stated this morning, there are so many things that various people want corrected in the old statute that I was very much afraid to get into it for fear we would get into a great deal of trouble in connection with it; and I have sought in this bill in the other sections to prevent any controversy arising under the old act. Therefore I intended that those words should apply to these particular sections."

Senator Bratton said:

> "I concur with the Senator that we should free ourselves of any contact with the old act; and I think I shall withdraw the amendment. I do not care to go into the old act. I think we should not do so."

The matter rested there until February 27, 1933, on which date the bill was about to be voted on. The following occurred (Congressional Record, p. 5278):

> "Mr. Bratton. Mr. President, let me say to the Senator from Delaware that on Saturday I offered an amendment, to come in on

page 42, line 6, and withdrew it temporarily. It was in this language:

A claim for future rent shall constitute a provable debt and shall be liquidated under Section 63(b) of this act.

Upon further consideration I think that amendment should be included in the bill, and I hope the Senator will accept it.

Mr. Hastings. Mr. President, the Senator from New Mexico will recall that the only reason I objected to it was because I was afraid it would open the door to amendments to the general bankruptcy law. If we are now in a position where we are about to vote on the bill to-night and there is no danger of our getting into controversy by trying to amend the bankruptcy law *generally,* I will accept the amendment." (Italics ours.)

It is quite evident that this amendment was objected to and withdrawn because it was thought to be an amendment to the text of prior provisions of the Bankruptcy Act. Senator Hastings feared that if he agreed to it, other such amendments would be pressed upon him. When the amendment was presented a second time on February 27th, the bill was about to be voted on. It is evident that Senator Hastings was then willing to accept the amendment, notwithstanding he considered it an amendment to the prior act, because the bill was to be voted on that night, and he thought there was no danger of getting into controversy by trying to amend the bankruptcy law "generally".

The Court below refused to give to this amendment its plain meaning because found in Chapter VIII. The fact that the amendment was inserted in Chapter VIII relating to other aspects of the bankruptcy situation instead of being explicitly enacted as

an amendment to Section 63(a), ought not to result in a refusal to give it effect. Congress often enacts important legislation by inserting it in irrelevant places. It is not restricted as are many state legislatures by constitutional provisions requiring a bill to relate only to one subject to be expressed in its title.

This amendment means what it says and was placed in this statute for the obvious purpose of clearing up a situation resulting from conflicting decisions in lower Federal courts.

The conclusion should be that the amendment was declaratory and intended to make it clear that landlords' claims are provable "under this act".

This declaratory amendment makes no distinction between claims on leases containing indemnity covenants and those which do not. It declares the intention of Congress that in any case where a tenant becomes bankrupt his liability for future rents shall be discharged and the landlord may participate in the distribution of assets to the extent of his damage. It supports our view as to the broad operation of the original act.

Reference should be made to pending legislation on this subject. On June 5, 1933 the House of Representatives passed the bill H. R. 5884. The principal purpose of this bill was to add a new section to Chapter VIII providing for corporate reorganizations. Meanwhile, question had arisen as to whether the sentence in the Act of March 3rd that a claim for future rents shall constitute a provable debt was limited in its operation to proceedings under Chapter VIII. [See, *In re Brooks Sample Furniture Co.*, U. S. Dist. Ct. Conn., 4 Fed. Supp. 858.] For the evident purpose of removing doubt on that question

and of placing the provision relating to proof of such claims in the appropriate section, the bill H. R. 5884 contains a Section 4 which amends Section 63(a), which defines provable claims, by adding the following:

> "(7) Claims for damages respecting executory contracts including future rents whether the bankrupt be an individual or a corporation, which claims shall be liquidated under Section 63(b) of this act." (The Congressional Record, Seventy-Third Congress, First Session, Vol. 77 No. 68, pp. 5111 to 5115.)

Like the Act of March 3, it makes no provision respecting pending cases, which would have been very desirable, if the amendment is more than a clarifying change in the text, nor does it distinguish between leases with indemnity clauses and those without.

The House Committee on the Judiciary in reporting this bill to the House June 2, 1933 (Report No. 194, House of Representatives, Seventy-Third Congress, First Session) said this:

> "This Section 4(a) also provides that claims for damages respecting executory contracts including future rents shall constitute a provable debt in bankruptcy proceedings and shall be liquidated under Section 63 of the Bankruptcy Act."

There is nothing in the report to suggest that the Committee thought they were changing the law. Under the head of "Changes in Existing Law" they do quote the amended Section 63(a), but it is evident that they were setting forth changes in the text of the statute as required by Rule XIII, Par. 2a, of

the Rules of the House of Representatives. If this bill is enacted (and it is now pending in the Senate) in its present form, it will leave the law just as we contend it to be. It accepts the broad view that all such landlords' claims shall be deemed provable regardless of special covenants.

CONCLUSION

The conclusion should be that these claims are provable, without regard to the presence of special indemnity covenants, or at least, because of them.

Respectfully submitted,

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